

**Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554**

In the Matter of:

Communications Assistance for Law
Enforcement Act and Broadband Access
and Services

ET Doc. No. 04-295

RM-10865

**REPLY COMMENTS OF
THE INFORMATION TECHNOLOGY INDUSTRY COUNCIL**

Nick Kolovos

**INFORMATION TECHNOLOGY INDUSTRY
COUNCIL**
1250 I Street NW
Suite 200
Washington, D.C. 20005
(202) 626-5744

Scott Blake Harris
S. Roberts Carter III

HARRIS, WILTSHIRE & GRANNIS LLP
1200 Eighteenth Street, NW
Washington, DC 20036
(202) 730-1300

December 21, 2005

TABLE OF CONTENTS

INTRODUCTION AND SUMMARY 1

I. THE COMMISSION MUST REFUSE TO EXTEND CALEA TO NON-INTERCONNECTED VOIP SERVICES. 3

A. One-Way Services Are Not a Substantial Replacement for Local Telephone Exchange Service..... 5

B. The Record Does Not Support Removing Any of the Remaining Interconnected VoIP Definition Elements. 8

II. NON-FACILITIES-BASED INTERNET ACCESS SERVICE PROVIDERS SHOULD NOT BE SUBJECT TO CALEA. 11

III. AT MINIMUM, CONSIDERATION OF THE PROPOSED EXTENSIONS MUST WAIT UNTIL THE EFFECT ON NEW TECHNOLOGIES CAN BE FULLY DETERMINED.... 13

CONCLUSION 16

**Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554**

In the Matter of:

Communications Assistance for Law
Enforcement Act and Broadband Access
and Services

ET Doc. No. 04-295

RM-10865

INTRODUCTION AND SUMMARY

In its initial comments responding to the Commission’s *Further Notice of Proposed Rulemaking*,¹ the Information Technology Industry Council (“ITI”) urged the Commission to reject extensions of CALEA to “non-managed” VoIP and suggested that the Commission reiterate that CALEA does not apply to private networks. ITI further recommended that the Commission reset and extend the compliance deadline, based on the lengthy compliance history of the PSTN and wireless industries and the current lack of clear and actionable compliance requirements for the VoIP industry.² As ITI then explained, reasonable compliance deadlines will limit the need for CALEA waivers or exemptions, and the concomitant administrative burdens. In the end, it will also lead to more effective CALEA solutions and more effective help for law enforcement.

ITI further urged the Commission to reaffirm that implementation of CALEA requirements should “not favor any particular technology over another,” and that this

¹ See *Communications Assistance for Law Enforcement Act and Broadband Access and Services*, First Report and Order and Notice of Proposed Rulemaking, ET Docket No. 04-295 (rel. Sept. 23, 2005) (“*Order*” or “*Further Notice*”).

² It is a basic concept of due process that fines not be imposed for violating obligations if the scope and extent of those obligations is unknown – or even unclear.

technology-neutral position includes the recognition that there will be no government preconditions placed on new technologies or applications. Finally, ITI asked the Commission to re-acknowledge the importance that Congress placed on assuring the privacy of communications not authorized for intercept.

The many comments filed in response to the *Further Notice* reflect a clear consensus that CALEA should not extend beyond the parameters set by the *First Report and Order*.³ The primary outliers are a company that offers a brand of CALEA compliance service,⁴ and the United States Department of Justice (“DOJ”), which, in effect, asks the Commission to overturn Congress’s decision rejecting law enforcement’s early proposals extending CALEA to all communications service providers.⁵

³ See, e.g., Comments of Cornell University, Comments of Earthlink, Inc., Comments of Skype Technologies, S.A., Comments of the Electronic Privacy Information Center, Comments of the Telecommunications Industry Association, Duke University Office of the President Comment on the Federal Communications Commission amendment of the Communications Assistance Law Enforcement Act of 1994 As It Applies to Teaching and Research Institutions, Comments of the American Library Association, Association of Research Libraries and Association of College and Research Libraries, Joint Comments of the Center for Democracy and Technology, Electronic Frontier Foundation, and Pulver.com to the Further Notice of Proposed Rulemaking, Reply Comments of 3Com Corporation. See also Request for Stay Pending Issuance of Subsequent Orders and for Stay Pending Judicial Review Submitted on Behalf of Center for Democracy & Technology, American Library Association, Association for Community Networking, Association of College and Research Libraries, Association of Research Libraries, Champaign Urbana Community Wireless Network, Electronic Frontier Foundation, Electronic Privacy Information Center, Pulver.com, Sun Microsystems and Texas Internet Service Providers Association (filed Nov. 23, 2005) (arguing, among other things, that the 47 U.S.C. § 1001(8)(B)(ii) substantial replacement provision does not justify an extension of CALEA based on the current record and that the Commission should not have started the compliance clock without telling effected entities what compliance means).

⁴ See Comments of VeriSign, Inc. at 2 (contending that there are no financial or equitable justifications for granting *any* exemptions to the CALEA requirements “[g]iven the availability of highly cost-effective trusted third party CALEA compliance services from parties such as VeriSign”).

⁵ See *Telecommunications Carrier Assistance to the Government*, H.R. Rep. No. 103-827, pt. 1, at 20 (1994) (“*House Report*”), available at <http://www.askcalea.net/docs/hr103827.pdf> (“Earlier digital telephony proposals covered all providers of electronic communications services, which meant every business and institution in the country. That broad approach was not practical. Nor was it justified to meet any law enforcement need.”).

As the record before the Commission demonstrates, industry and individual entities stand ready to work with law enforcement to comply with such orders.⁶ Thus, the inquiry before the Commission is not about whether lawful access to new communications services should be available,⁷ but rather to what degree the specific requirements of a law designed to preserve the government’s surveillance capabilities with respect to the local telephone exchange also apply to new and different services.

The Commission should not expand the scope of its original order or attempt to apply its requirements to not yet clearly defined future services. Indeed, any attempt to do so will cause confusion, financial hardships, and operational burdens – thereby stifling innovation in a nascent industry.

I. THE COMMISSION MUST REFUSE TO EXTEND CALEA TO NON-INTERCONNECTED VOIP SERVICES.

ITI has urged the Commission not to extend CALEA obligations on interconnected VoIP to other “managed” VoIP services. Significantly, not even DOJ – which first advanced the managed/non-managed VoIP services distinction that the Commission later rejected as “unadministerable” – has continued to press the distinction as a means of determining what services should be covered. As the record overwhelmingly demonstrates, the extent to which a service is “managed” – assuming that a meaningful set of functions describing managed services could even be articulated

⁶ See, e.g., Earthlink Comments at 1 (“EarthLink is sensitive to the needs of law enforcement and is committed to offering needed assistance to promote and protect public safety and national security.”); Skype Comments at 1 (“Skype fully recognizes that law enforcement needs appropriate access to communications and related information... .”); Duke Comments at 3 (“Duke and other American colleges and universities have an exemplary record of cooperating fully and promptly with federal authorities on those very rare occasions that the government requests such information with appropriate warrants.”).

⁷ See Order at ¶ 43 (“Interconnected VoIP providers are already obligated to cooperate with law enforcement agencies under separate electronic surveillance laws.”).

– does not correlate with the criteria for determining whether a service is (or should be) subject to CALEA. Accordingly, the Commission should reaffirm its initial conclusion that the question of whether CALEA requirements apply to VoIP services depends in no way on the extent to which those services are “managed.”⁸

As the Commission stated in the *First Report and Order*, interconnected VoIP services that are subject to CALEA include only those services that: “(1) enable real-time, two-way voice communications; (2) require a broadband connection from the user’s location; (3) require IP-compatible customer premises equipment; and (4) permit users to receive calls from *and* terminate calls to the PSTN.”⁹ Although DOJ has not openly asked for an extension of CALEA to non-interconnected VoIP, it proposes a dramatic extension of CALEA by “clarifying” the interconnected VoIP definition – an action that effectively removes three of the definition’s four requirements. Whether intended as a straightforward extension of CALEA to non-interconnected VoIP services or as a “clarification” of the Commission’s findings, DOJ’s proposed expansion of the CALEA requirements should be rejected, as it goes beyond both Congressional intent and sound policy. Indeed, Congress placed a clear burden on “industry, law enforcement and the FCC to narrowly interpret the [CALEA] requirements,” cautioning that they must serve as “both a floor and a ceiling,” that “information services ... are excluded from compliance” and that Congress’s actions were “not intended to guarantee ‘one-stop shopping’ for law enforcement.”¹⁰

⁸ *See id.* at ¶ 40.

⁹ *Order* at ¶ 39 (emphasis in original) (citing *IP-Enabled Services and E911 Requirements for IP Enabled Service Providers*, First Report and Order and Notice of Proposed Rulemaking, WC Docket Nos. 04-36 and 05-196 (rel. June 3, 2005) (“E911 Order”)).

¹⁰ *House Report* at 23.

A. One-Way Services Are Not a Substantial Replacement for Local Telephone Exchange Service.

In the *First Report and Order*, the Commission reasoned that interconnected VoIP services satisfy CALEA’s Substantial Replacement Provision (“SRP”)¹¹ because such offerings “enable[] a customer to do everything (or nearly everything) the customer could do using an analog telephone.”¹² DOJ maintains that the definition of interconnected VoIP should be expanded to include services that provide *only* the ability to receive calls from the PSTN *or* the ability to terminate calls to the PSTN, despite the fact that neither service standing alone could “replace[] the legacy POTS service functionality of traditional local telephone exchange service.”¹³ This argument – seeking to eliminate the fourth part of the current definition of interconnected VoIP services – must fail.

First, DOJ relies on the Commission’s tentative conclusion in the first *Notice of Proposed Rulemaking* that individual replacements for “particular functionalities of local exchange service” trigger the SRP.¹⁴ This proposed framework was directly criticized in the first round of comments for eliminating the word “substantial” from the definition of the SRP – and the critics at the time included DOJ.¹⁵ As DOJ then cautioned:

¹¹ See 47 U.S.C. § 1001(8)(B)(ii).

¹² *Order* at ¶ 42.

¹³ *Id.*

¹⁴ DOJ Comments at 5 (citing *Communications Assistance for Law Enforcement Act and Broadband Access and Services*, Notice of Proposed Rulemaking and Declaratory Ruling, 19 FCC Rcd. 15676, 15699 (2004) (“*NPRM*”).

¹⁵ See Comments of the United States Department of Justice (filed Nov. 8, 2004) (“*DOJ NPRM Comments*”) at 14. See also Comments of BellSouth Corp. at 8 (filed Nov. 8, 2004) (“a replacement for a substantial portion of the local exchange service’ must be capable of replacing all (or at least a majority) of the functionalities of local exchange service, including, for example, the ability to make local voice calls, access to 911, and access to long distance service”); Comments of Electronic Frontier Foundation at 10 (filed Nov. 8, 2004) (arguing that the Notice “reads ‘substantial’ out of the clause, finding it means ‘any’ portion”); Comments of Global Crossing North America, Inc. at 7 (filed Nov. 8,

In interpreting the phrase “a replacement for a substantial portion of the local telephone exchange service,” the Commission should ensure that it gives meaning to the word “substantial” as well as to the word “replacement.” The Commission should conclude that a service replaces not just “*any* portion of an individual subscriber’s functionality previously provided via POTS” but in fact replaces a *substantial* portion of local telephone exchange service.¹⁶

Despite this previous admonition against applying CALEA to “any portion of functionality” replacing the local telephone exchange service, this is exactly what DOJ now proposes – arguing that CALEA should be extended to “*all* services that interconnect with the PSTN.”¹⁷ This request is extremely close to law enforcement proposals that Congress previously rejected.¹⁸

DOJ contends that the ability to make calls to the PSTN or the ability to receive calls from the PSTN is a “substantial function” in its own right.¹⁹ This claim, however, is irrelevant under the substantial replacement provision of the statute. Under the SRP, the Commission must find not that a function is “substantial” in some theoretical sense, but rather that a new service has supplanted a substantial portion of the *entire* local telephone

2004) (arguing that “replacing the word ‘substantial’ with the word ‘any’ is not ‘a permissible construction of the statute’ because the term ‘substantial portion’ sets a high bar that requires the Commission to set *some* limiting standard”) (emphasis in original).

¹⁶ *DOJ NPRM Comments* at 14 (emphasis in original, citation omitted). *See also House Report* at 22 (explaining that CALEA requirements apply “to the extent that such person or entity serves as a replacement for the local telephone service *to a substantial portion of the public within a state*”) (emphasis added).

¹⁷ DOJ Comments at 24 (emphasis added).

¹⁸ *See House Report* at 20. As former FBI director Louis Freeh explained, law enforcements’ earlier proposed legislation was “rejected out of hand” by Congress and “had to be narrowed in focus.” Wiretapping: Joint Hearings before the Subcomm. on Tech. and the Law of the Senate Comm. on the Judiciary and the Subcomm. on Civil and Constitutional Rights of the House Comm. On the Judiciary, 103rd Cong. (1994) (statement of FBI Director Louis Freeh).

¹⁹ DOJ Comments at 6.

exchange.²⁰ As noted in the *First Report and Order*, the local telephone exchange serves many purposes: it allows its users to make, receive and direct calls, as well as to “access many non-local exchange services such as long-distance services, enhanced services, and the Internet.”²¹ DOJ has failed to explain how a replacement of one subset of one function of local voice service (POTS) is the equivalent of replacing the services provided by a *substantial* portion of the *entire* local telephone exchange. In fact, DOJ’s proposal seems to contemplate that individuals will retain their POTS service even if they do obtain these “replacements.”²²

Finally, DOJ and its one private sector ally (which also urges an extension of CALEA) rely on language in Section 103 of CALEA that assistance capabilities apply to “equipment, facilities or services that provide a customer or subscriber with the ability to originate, terminate, *or* direct communications,”²³ in support of their arguments that the definition of interconnected VoIP should be expanded. This reading of the statute is backwards. The capability requirements apply *after* the Commission has found that the entity at issue is a telecommunications carrier; they are not part of the framework for determining *whether* a party is a communications carrier in the first place.²⁴

²⁰ See 47 U.S.C. § 1001(8)(B)(ii). DOJ also argues briefly that interconnection in either direction satisfies Congress’s intent that CALEA apply to facilities that allow a customer to access the publicly switched network. See *House Report* at 21-22. DOJ’s discussion of Congressional intent is puzzling given that, as noted above, Congress was also clear that the SRP applies only when the service “serves as a replacement for the local telephone service *to a substantial portion of the public within a state.*” *Id.* at 22 (emphasis added). DOJ has not argued that its proposed extension meets this requirement.

²¹ *Order* at ¶ 13.

²² See DOJ Comments at 7.

²³ 47 U.S.C. § 1002(a) (emphasis added).

²⁴ See *id.* (requiring “*a telecommunications carrier* to ensure that its equipment, facilities or services that provide a customer or subscriber with the ability to originate, terminate, or direct communications...” (emphasis added)).

In short, the rationale DOJ has provided for expanding interconnected VoIP to include *all* services connecting to the PSTN does not provide a basis for the Commission to make its required finding that a new service has replaced a substantial portion of the local telephone exchange. The Commission should reject this proposed expansion and reaffirm its requirement that services that trigger the SRP “enable[] a customer to do everything (or nearly everything) the customer could do using an analog telephone,” particularly since the existing definition is “responsive to DOJ’s needs at this time.”²⁵

B. The Record Does Not Support Removing Any of the Remaining Interconnected VoIP Definition Elements.

The SRP mandates that the Commission identify a specific “person or entity” that provides a service that replaces a substantial portion of the local telephone exchange.²⁶ Despite this clear requirement, DOJ insists that the Commission remove two additional parts of the current definition of interconnected VoIP services – based solely on speculation that future VoIP services might be offered that would not be covered by the existing definition. Such speculation cannot be the basis for rational policymaking. DOJ must provide specific examples of the additional VoIP services that it seeks to subject to CALEA before the Commission can rationally change the interconnected VoIP definition for the purpose of covering such services.

DOJ first proposes eliminating part two of the current definition of interconnected VoIP services by arguing that CALEA obligations should not be limited to services that require a broadband connection. Not only would that be a significant change of course for the broadband-centric history of this proceeding, but DOJ has not provided a clear

²⁵ *Order* at ¶¶ 40, 42.

²⁶ 47 U.S.C. § 1001(8)(B)(ii).

rationale for omitting this requirement. As ITI explained in its comments in the Commission's E911 proceedings, it is unclear "whether narrowband [IP] services will ever be able to provide the two-way, real-time voice connectivity that interconnected VoIP services require."²⁷

Although some peer-to-peer personal computer VoIP software may list a narrowband connection as a "minimum" system requirement,²⁸ ITI is unaware of any VoIP services capable of providing persistent voice-grade communications to and from the PSTN via narrowband. Indeed, while the Commission in the E911 proceeding recognized that some kinds of VoIP communications might be possible over a dial-up connection, it observed that "most VoIP services will be used over a broadband connection."²⁹ If DOJ has knowledge of specific VoIP services or technologies available over narrowband that offer true real time two-way communications – including voice-grade communications with the PSTN – it should identify them in the record. In the meantime, adopting DOJ's proposal would be entirely speculative and, thus, arbitrary.³⁰

²⁷ *IP-Enabled Services; E911 Requirements for IP-Enabled Service Providers*, WC Docket Nos. 04-36, 05-196, Comments of the Information Technology Industry Council (filed Aug. 15, 2005) at 5.

²⁸ *See, e.g.*, Google Talk Frequently Asked Questions, at <http://www.google.com/talk/about.html> ("To use Google Talk, you ... need a minimum 56k dial up connection, but a broadband connection is recommended.").

²⁹ *E911 Order* at ¶ 24 n. 76. *See also* Industry Competition and Consolidation: The Telecom Marketplace Nine Years After the Telecom Act: Hearing Before the Comm. on the Judiciary of the House of Representatives, 109th Cong. 49 (2005) (testimony of Brian R. Moir, attorney-at-law, on behalf of E-Commerce and Telecommunications Assoc.) *available at* http://frwebgate.access.gpo.gov/cgi-bin/getdoc.cgi?dbname=109_house_hearings&docid=f:20708.pdf ("[I]n order to have VoIP, you first have to have a non- narrowband pipe..."); Wireless VoIP Good for Fixed Environment, Lags for Mobile Apps, RCR Wireless News, July 12, 2004, *available at* <http://newmillenniumresearch.org/news/ipnetworks/media.html> ("A broadband connection is necessary for VoIP.").

³⁰ *See House Report* at 24 (cautioning that CALEA does not "impose prospectively functional requirements on the Internet.")

DOJ also requests that the third part of the current definition of interconnected VoIP services be eliminated by urging that requirement for IP-compatible customer premises equipment (CPE) be removed, because this element could be “misunderstood to exclude services that may be used with other types of equipment.”³¹ However, it is axiomatic that all Voice over *Internet Protocol* services – including interconnected VoIP – must use equipment that actually employs IP. Voice services that use “other types of equipment” that are incapable of communicating with IP-based packet-switched networks may be digital, and may be capable of real time communications, but they are not VoIP.

Not surprisingly, ITI has been unable to locate any VoIP offering in the marketplace that does not require some use of IP-aware CPE, whether in the form of personal computers, IP-enabled phones, routers, analog telephone adaptors, terminal adaptors, or other equipment to allow non-IP compatible devices or infrastructure at the premises to be used with the service offering. If future “VoIP” services are developed that allow the customer to communicate without any equipment that speaks the IP protocol and these services would not otherwise be subject to CALEA, DOJ may petition for their inclusion at that time.³² Again, speculation cannot be the basis for rational policy decisions.

Finally, as noted above, one company, which offers a brand of CALEA compliance service, has proposed an even broader expansion of the interconnected VoIP definition than DOJ. This company argues that CALEA applies to all entities that offer any services to the public using the Session Initiation Protocol (“SIP”) or similar

³¹ DOJ Comments at 8.

³² For the reasons set forth above, ITI submits that such services, assuming they are developed, most likely would not be subject to CALEA as “VoIP” services.

protocols.³³ The Commission need not dwell on this suggestion to tie CALEA obligations to particular protocols, since the company makes no effort to harmonize its proposed expansion (which presumably even reaches applications such as instant messaging) with either the SRP or the CALEA information services exclusion.³⁴ Rather, the company dismisses the entire concept of the PSTN and local telephone exchange as “irrelevant,” theorizing that the PSTN soon will be replaced by a “ubiquitous . . . service of public IP-enabled Next Generation Networks.”³⁵ Such speculation is not a lawful justification for extending CALEA beyond the terms of the statute enacted by Congress, nor to services that may or may not be provided in the future. If anything, this proposal proves the need to let future services develop and achieve commercial viability before attempting to regulate them. As Congress well knew, ready-fire-aim approaches to regulation—especially without a defined target—can only lead to bad (not to mention unlawful) decisions. As Congress more eloquently put it, CALEA does not “impose prospectively functional requirements on the Internet.”³⁶

II. NON-FACILITIES-BASED INTERNET ACCESS SERVICE PROVIDERS SHOULD NOT BE SUBJECT TO CALEA.

In addition to its proposed “clarification” of the interconnected VoIP definition, DOJ proposes that the Commission extend its original finding to include non-facilities-

³³ See VeriSign Comments at 6. SIP is a signaling protocol used to create interactive user sessions over a network, and is employed by a number of multimedia applications, including voice applications. See Wikipedia: Session Initiation Protocol, at http://en.wikipedia.org/wiki/Session_Initiation_Protocol. SIP is not a communications platform, and does not, by itself, provide “communication switching or transmission service.”

³⁴ See 47 U.S.C. § 1001(8)(C)(i).

³⁵ VeriSign Comments at 6.

³⁶ House Report at 24.

based Internet access providers. First, this issue is not even on the table; the Commission has already wisely chosen *not* to seek additional comment on its decision to extend CALEA only to facilities-based Internet service providers.³⁷ But even if the Commission decides to consider DOJ's request, it should not be granted. The Commission already has made clear that certain entities reselling Internet access to customers are not subject to CALEA.³⁸ The rationale for this finding – that the “provider of the underlying facilities” to the reseller already is covered by CALEA – is simple and straightforward, and also applies to the additional non-facilities-based Internet access providers DOJ now seeks to cover.

In support of its argument for extending CALEA obligations, DOJ notes that the Commission has extended CALEA to resellers of telephone service.³⁹ But many resellers of telephone service are also facilities-based providers, even if only to a limited extent. For example, “[t]o be recognized as a ...Competitive Local Exchange Carrier by most local regulatory authorities in the United States and to receive reciprocal compensation from the local ILEC,” an entity is required to, “at minimum, own a central office switch.”⁴⁰ In contrast, there are no such ownership requirements for Internet access resellers, many of which may not operate any facilities beyond a call center that has no

³⁷ See *Order* at ¶¶ 48-52.

³⁸ See *id.* at ¶ 36.

³⁹ DOJ also asserts, without citation, that “resellers ... of interconnected VoIP services are subject to CALEA.” DOJ Comments at 9-10. This is not the Commission's finding. Rather, the Commission explained that VoIP providers that do not own their underlying transmission facilities would be covered by CALEA because “any VoIP provider that is interconnected to the PSTN ‘must necessarily’ use a router or other server to do so.” *Order* at ¶ 41. While interconnected VoIP providers may all be “resellers” of switching services to some extent, it does not follow that an entity that merely rebrands another's interconnected VoIP offering also would be covered by CALEA. Indeed, the fact that the original interconnected VoIP provider is covered obviates the need to cover additional entities.

⁴⁰ Newton's Telecom Dictionary at 310 (19th Ed. 2003).

physical connection to Internet switching equipment, and therefore would not have access to or control over any of the equipment or facilities subject to CALEA.

As DOJ acknowledges, resellers' obligations "may generally be limited to the facilities that they provide."⁴¹ Indeed, this was the very approach taken by the Commission with respect to resellers of telephone service.⁴² Because the underlying switching and transmission facilities provided by the wholesaler already are covered by CALEA, subjecting another entity to regulation – "even if the provider does not happen to own the switching or transmission facilities"⁴³ – is unnecessary. Moreover, as Congress made clear, each individual component of a network need not be subject to CALEA "so long as each communication can be intercepted at some point."⁴⁴ Although DOJ may want to subject resellers to CALEA, this is not what the law requires; indeed, Congress was clear that CALEA provides no "guarantee [of] 'one-stop shopping' for law enforcement."⁴⁵ In short, ITI believes there is no legal or practical rationale for extending CALEA to non-facilities-based Internet access service providers when they do not control the communications equipment. Thus, DOJ's request should be rejected.

III. AT MINIMUM, CONSIDERATION OF THE PROPOSED EXTENSIONS MUST WAIT UNTIL THE EFFECT ON NEW TECHNOLOGIES CAN BE FULLY DETERMINED.

The Commission already has determined that "[i]nterconnected VoIP services today include many of the types of VoIP offerings that DOJ's Petition indicates should be

⁴¹ DOJ Comments at 10 (citing *Communications Assistance for Law Enforcement Act*, Second Order on Reconsideration, 16 FCC Rcd. 8959, 8971 ¶ 37 (2001)) ("*Second Order on Reconsideration*").

⁴² *Second Order on Reconsideration*, 16 FCC Rcd. at 8971 ¶37.

⁴³ DOJ Comments at 9.

⁴⁴ *House Report* at 24.

⁴⁵ *Id.* at 23.

covered by CALEA, and is thus responsive to DOJ's needs at this time."⁴⁶ Indeed, as several comments in this proceeding have noted, DOJ has not cited any specific examples where existing enforcement mechanisms have been insufficient to obtain the information sought. While the record reflects no compelling reason for the Commission to act immediately to extend the scope of CALEA, there are several reasons not to do so. ITI joins those organizations whose comments have advocated patience and flexibility when considering any additional proposed expansions.⁴⁷

First, although interconnected VoIP services (as defined by the *First Report and Order*) are now being deployed in the marketplace, the overall market for VoIP services is still emerging. Indeed, the Commission's struggles to define VoIP services that might fall under CALEA's ambit – looking at the extent to whether the services are “managed,” abandoning this distinction, and then apparently reviving it – confirm that many VoIP services are not subject to ready classification as well-understood, established technologies.⁴⁸ Because the recently imposed CALEA obligations are responsive to the current needs of law enforcement, there is little cost to waiting to see how the public uses other emerging VoIP services before deciding whether regulation is warranted.⁴⁹ In fact, portions of DOJ's comments seem to suggest this very approach, encouraging the

⁴⁶ *Order* at ¶ 40.

⁴⁷ *See, e.g.*, Comments of Skype Technologies, Comments of the Electronic Privacy Information Center (“EPIC”).

⁴⁸ *See* Skype Comments at 7 (“If it is too difficult to draw a meaningful distinction between managed and non-managed VoIP, surely it is too difficult to draw a rational, easily administrable line between managed services that should be covered by CALEA and those that should not.”).

⁴⁹ *See NRPM*, 19 Fcc Rcd. at 15707 ¶ 53 (noting that “there is a wide array of packet-based services currently using IP as well as numerous ways that VoIP capabilities might be provided to consumers”).

Commission to consider the evolution of technology and “revisit” the notion of what constitutes the PSTN in the future.⁵⁰

While DOJ has not demonstrated that law enforcement will be harmed without an immediate further expansion of CALEA, gutting the existing definition of interconnected VoIP would serve to create uncertainty and stifle innovation as existing voice technologies mature and additional technologies emerge. The Commission downplayed these concerns in the *First Report and Order* when first considering the application of CALEA to VoIP providers, noting that “[i]nterconnected VoIP providers are already obligated to cooperate with law enforcement agencies under separate electronic surveillance laws.”⁵¹ While this assertion may be true, these other obligations are unlike CALEA, and the imposition of CALEA obligations – whatever else they do – jeopardizes innovation. This is because, unlike other statutes, CALEA does not authorize surveillance; rather, it sets forth assistance requirements that manufacturers and developers must incorporate into equipment and that providers must deploy in their networks.⁵² If CALEA compliance is mandated based on speculation as to how technologies might be employed, the additional costs and architecture changes make it certain that many products and services will never be made available to consumers.⁵³

⁵⁰ See DOJ Comments at 8.

⁵¹ *Order* at ¶ 43. See also *House Report* at 24 (“While [CALEA] does not require reengineering of the Internet, ... this does not mean that communications carried over the Internet are immune from interception or that the Internet offers a safe haven for illegal activity. Communications carried over the Internet are subject to interception under Title III just like other electronic communications.”).

⁵² See *NRPM*, 19 FCC Rcd. at 15682-83 ¶ 14 (setting forth the evolution of the specific electronic surveillance capabilities that entities covered by CALEA must provide).

⁵³ As noted above, Congress has clearly stated that CALEA compliance should not be based on speculation and that CALEA does not impose prospective requirements. See *House Report* at 24.

Finally, ITI shares the concerns of the Electronic Privacy Information Center (EPIC) that expansion of CALEA to other voice applications makes them more vulnerable to security and privacy breaches.⁵⁴ As set forth in detail in EPIC’s comments, VoIP providers may be forced to fundamentally alter the architecture of their systems and move to more centralized systems – which would negate many of the security benefits obtained from deploying distributed systems and would make those systems more susceptible to attack. Such requirements would contravene the very purpose of CALEA, which “is to preserve the government’s ability, pursuant to court order or other lawful authorization, to intercept communications ... *while protecting the privacy of communications* and without impeding the introduction of new technologies, features, and services.”⁵⁵ In short, the potential extension of CALEA to non-interconnected VoIP is directly contrary to CALEA’s mandate that implementation must protect “the privacy and security of communication and call-identifying information.”⁵⁶

CONCLUSION

ITI appreciates the substantial challenges faced by the Commission in balancing the need to preserve law enforcement’s ability to conduct lawful surveillance over the local telephone exchange with the need to protect the privacy of American citizens and to allow the market to foster new and innovative communications solutions. While there has been substantial disagreement with respect to the Commission’s action to date, the

⁵⁴ See EPIC Comments at 10-14. See also *House Report* at 23-25.

⁵⁵ *House Report* at 12 (emphasis added).

⁵⁶ 47 U.S.C. § 1002(a)(4)(A). Indeed, Congress explained that the privacy of communications not authorized for intercept was of paramount significance in its decision making, noting that it is “important from a privacy standpoint to recognize that the scope of the legislation has been greatly narrowed” from the original proposals submitted by law enforcement. *House Report* at 19.

record regarding whether additional extensions are warranted beyond the scope of the *First Report and Order* is clear. In this regard, ITI urges the Commission to reaffirm its initial conclusion – and thereby re-acknowledge Congress’s intent – that CALEA does not apply to non-interconnected VoIP services. ITI further encourages the Commission to decline to extend CALEA to non-facilities-based Internet access providers or to any other technologies, services or applications not clearly within the scope of the CALEA statute.

Respectfully Submitted,

Nick Kolovos

/s/

Scott Blake Harris
S. Roberts Carter III

**INFORMATION TECHNOLOGY INDUSTRY
COUNCIL**
1250 I Street NW
Suite 200
Washington, D.C. 20005
(202) 626-5744

HARRIS, WILTSHIRE & GRANNIS LLP
1200 Eighteenth Street, NW
Washington, DC 20036
(202) 730-1300

December 21, 2005